

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: MICHIGAN

REQUIREMENTS FOR ADVANCE DIRECTIVES UNDER STATE PLANS
FOR MEDICAL ASSISTANCE

The following is a written description of the law of the State (whether statutory or as recognized by the courts of the State) concerning advance directives. If applicable States should include definitions of living will, durable power of attorney for health care, durable power of attorney, witness requirements, special State limitations on living will declarations, proxy designation, process information and State forms, and identify whether State law allows for a health care provider or agent of the provider to object to the implementation of advance directives on the basis of conscience.

The following written description of state law, advance directives, is based on Public Act 312 of 1990, being section 700.496 of Michigan Compiled Laws approved December 18, 1990. This law is known as Michigan's durable power of attorney for health care.

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JOHN ENGLER, Governor

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VERNICE DAVIS ANTHONY, MPH, Director

November 25, 1991

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TO: Administrators/Managers of Hospitals, Nursing Homes,
Hospice Programs, Home Health Agencies and
Health Maintenance Organizations

FROM: Walter S. Wheeler III, Chief
Bureau of Health Systems

SUBJECT: New Federal Requirements

The Federal Omnibus Budget Reconciliation Act of 1990 (OBRA) contains a section we now refer to as the "Patient Self-Determination Act" (PSDA) which imposes new responsibilities on certain providers of Medicare and/or Medicaid services. Effective December 1, 1991, hospitals, nursing homes, certain HMO agencies, home health agencies and hospice programs are required to develop policies and programs on advance directives and those programs must:

- Provide written information to patients/residents at admission regarding their rights under State law to make decisions regarding medical care and on the programs' policies governing implementation of those rights.
- Document in the patient/resident medical record whether or not he/she has executed an advance directive.
- Ensure compliance with the requirements of Michigan law respecting advance directives at the institution.
- Provide, individually or with others, education for staff and the community on issues concerning advance directives.

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- Not condition the provision of care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive.

In addition to this memorandum, this mailing contains a reprinting of the federal statutory change along with a short article on practical considerations regarding implementation that should be shared with your legal advisor and those responsible for implementation of this new requirement.

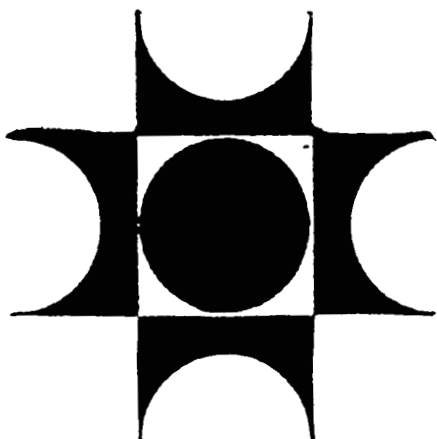
To assist you in explaining patients' rights under Michigan law, the Michigan Department of Public Health convened a panel of experts who were responsible for drafting and finalizing the enclosed guide entitled "MICHIGAN NOTICE TO PATIENTS." While you are required to provide the information contained in this guide to your patients at the time of admission, you are not required to use the document provided by the State. You may photocopy the material (with or without your own logo) or you may elect to include the contents of the guide in other material you are preparing to fulfill this new regulatory requirement.

Long-term care providers (nursing homes) will notice that the "MICHIGAN NOTICE TO PATIENTS" differs from the memorandum we issued in February 1991, which implied that a guardian was needed if a resident was no longer "able" to make his/her treatment decisions and that resident had not previously appointed a surrogate decision maker consistent with Michigan law. Our panel of experts considered this matter carefully and concluded that it is not always necessary to seek guardianship appointments when residents are "unable" to exercise their treatment decision options.

We believe this material will be of considerable assistance as your program changes to meet new federal requirements. We understand that several provider organizations are working with their members to assist in implementation. Questions specific to a type of provider should be referred to that organization. In addition, the legal community has expressed significant interest in this subject and is available for consultation. Many State Senators and Representatives have available in their office material describing the process for the appointment of a surrogate decision maker consistent with Michigan law.

Enclosure

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MICHIGAN NOTICE TO PATIENTS

REQUIRED BY THE PATIENT SELF DETERMINATION
ACT ("PSDA")

Distributed by the Michigan Department
of Public Health
Bureau of Health Systems
Nov. 1991

YOUR RIGHTS TO MAKE MEDICAL TREATMENT DECISIONS

We are giving you this material to tell you about your right to make your own decisions about your medical treatment. As a competent adult, you have the right to accept or refuse any medical treatment. "Competent" means you have the ability to understand your medical condition and the medical treatments for it, to weigh the possible benefits and risks of each such treatment and then to decide whether you want to accept treatment or not.

WHO DECIDES WHAT TREATMENT I WILL GET?

As long as you are competent, you are the only person who can decide what medical treatment you want to accept or reject. You will be given information and advice about the pros and cons of different kinds of treatment and you can ask questions about your options. But only you can say "yes" or "no" to any treatment offered. You can say "no" even if the treatment you refuse might keep you alive longer and even if others want you to have it.

WHAT IF I'M IN NO CONDITION TO DECIDE?

If you become unable to make your own decisions about medical care, decisions will have to be made for you. If you haven't given prior instructions, no one will know what you would want. There may be difficult questions: for instance, would you refuse treatment if you were unconscious and not likely to wake up? Would you refuse treatment if you were going to die soon no matter what? Would you want to receive any treatment your care givers recommend? When your wishes are not known, your family or the courts may have to decide what to do.

WHAT CAN I DO NOW TO SEE THAT MY WISHES ARE HONORED IN THE FUTURE?

While you are competent, you can name someone to make medical treatment decisions for you should you ever be unable to make them for yourself. To be certain that the person you name has the legal right to make those decisions, you must fill out a form called either a durable power of attorney for health care or a Patient Advocate Designation. The person named in the form to make or carry out your decisions about treatment is called a Patient Advocate. You have the right to give your Patient Advocate, your care givers and your family and friends written or spoken instructions about what medical treatment you want and don't want to receive.

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WHO CAN BE MY PATIENT ADVOCATE?

You can choose anyone to be your Patient Advocate as long as the person is at least 18 years old. You can pick a family member or a friend or any other person you trust, but you should make sure that person is willing to serve by signing an acceptance form. It's a good idea to name a backup choice, too, just in case the first person is unwilling or unable to act when the time comes.

WHERE CAN I GET A PATIENT ADVOCATE DESIGNATION FORM?

Many Michigan hospitals, health maintenance organizations, nursing homes, homes for the aged, hospices and home health care agencies make forms available to people free of charge. Many senior citizens' groups and church and civic groups do, too. You can also get a free form from various members of the Michigan legislature. Many lawyers also prepare Patient Advocate Designations for their clients. The forms aren't all alike. You should pick the one which suits your situation the best.

HOW DO I SIGN A PATIENT ADVOCATE DESIGNATION FORM SO THAT IT'S VALID?

All you have to do is fill in the name of the advocate and sign the form in front of two witnesses. But that's not as simple as it sounds, because under this law some people cannot be your witnesses. Your spouse, parents, grandchildren, children, and brothers or sisters, for example, cannot witness your signature. Neither can anyone else who could be your heir or who is named to receive something in your will, or who is an employee of a company that insures your life or health. Finally, the law disqualifies the person you name as your Patient Advocate, your doctors and all employees of the facility or agency providing health care to you from being a witness to your signature.

It is easier to make a Patient Advocate Designation before you become a patient or resident of a health care facility or agency. Friends or co-workers are often good people to ask to be witnesses, since they see you often and can, if necessary, swear that you acted voluntarily and were of sound mind when you made out the form.

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DO I HAVE TO GIVE MY PATIENT ADVOCATE INSTRUCTIONS?

No. A Patient Advocate Designation can be used just to name your Patient Advocate, the person you want to make decisions for you. But written instructions are generally helpful to everybody involved. And, if you want your Patient Advocate to be able to refuse treatment and let you die, you have to say so specifically in the Patient Advocate Designation document itself. Any other instructions you have you can either write down or just tell your Patient Advocate. Either way, the Patient Advocate's job is to follow your instructions.

CAN I JUST GIVE INSTRUCTIONS AND NOT NAME A PATIENT ADVOCATE?

Yes, you can simply tell somebody, for example, your care giver or your family and close friends, what your wishes are. Better yet, you can write what is called a "Living Will," which is a written statement of your choices about medical treatment. Even though there is not yet a state Living Will law, courts and health care providers still find Living Wills valuable. Those taking care of you will pay more attention to what you have written about your treatment choices, whether in a Patient Advocate Designation or a Living Will, because they can be more confident they know what you would have wanted. Most doctors, hospitals and other health care providers will also pay attention to what you've said to others, especially your family, about medical treatment. But again, it's better for everyone involved if you write your wishes down.

DO I HAVE TO MAKE A DECISION NOW ABOUT MY FUTURE MEDICAL TREATMENT?

No. You don't have to fill out a Patient Advocate Designation or a Living Will and you don't have to tell anybody your wishes about medical treatment. You will still get the medical treatment you choose now, while you are competent. If you become unable to make decisions, but you've made sure that your family and friends know what you would want, they will be able to follow your wishes. Without instructions from you, your family or friends and care givers may still be able to agree how to proceed. If they don't, however, a court may have to name a guardian to make decisions for you.

IF I MAKE DECISIONS NOW, CAN I CHANGE MY MIND LATER?

Yes. You can give new instructions in writing or orally. You can also change your mind about naming a Patient Advocate at all and cancel a Patient Advocate Designation at any time.

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You should review your Patient Advocate Designation or Living Will at least once a year to make sure it still accurately states how you want to be treated and/or names the person you want to make decisions for you.

WHAT ELSE SHOULD I THINK ABOUT?

Treatment decisions are difficult. We encourage you to think about them in advance and discuss them with your family, friends, advisors and care givers. You can and should ask your facility or agency about their treatment policies and procedures to be sure you understand them and how they work.

If you want more information about a Patient Advocate Designation or Living Wills, or sample forms, please ask your care givers for assistance. Many facilities and agencies have staff available who can answer your questions. Additional materials may be available from your state representative or senator.

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OMNIBUS BUDGET RECONCILIATION ACT OF 1990

P.L. 101-508

TEXT OF THE PATIENT SELF- DETERMINATION ACT

SEC. 4206. MEDICARE PROVIDER AGREEMENTS ASSURING THE IMPLEMENTATION OF A PATIENT'S RIGHT TO PARTICIPATE IN AND DIRECT HEALTH CARE DECISIONS AFFECTING THE PATIENT.

(a) In General — Section 1866(a)(1)(42 U.S.C. 1395cc(a)(1)) is amended —

(1) in subsection (a)(1) —

(A) by striking "and" at the end of subparagraph (O),

(B) by striking the period at the end of subparagraph (P) and inserting ", and", and

(C) by inserting after subparagraph (P) the following new subparagraph:

"(Q) in the case of hospitals, skilled nursing facilities, home health agencies, and hospice programs, to comply with the requirement of subsection (f) (relating to maintaining written policies and procedures respecting advance directives)."; and

(2) by inserting after subsection (e) the following new subsection:

"(f)(1) For purposes of subsection (a)(1)(Q) and sections 1819 (c)(2)(E), 1833(r), 1876(c)(8), and 1891(a)(6), the requirement of this subsection is that a provider of services or prepaid or eligible organization (as the case may be) maintain written policies and procedures with respect to all adult individuals receiving medical care by or through the provider or organization —

"(A) to provide written information to each such individual concerning —

"(i) an individual's rights under State law (whether statutory or as recognized by the courts of the State) to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives (as defined in paragraph (3)), and

"(ii) the written policies of the provider or organization respecting the implementation of such rights;

"(B) to document in the individual's medical record whether or not the individual has executed an advance directive;

"(C) not to condition the provision of care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive;

"(D) to ensure compliance with requirements of State law (whether statutory or as recognized by the courts of the State) respecting advance directives at facilities of the provider or organization; and

"(E) to provide (individually or with others) for education for staff and the community on issues concerning advance directives.

Subparagraph (C) shall not be construed as requiring the provision of care which conflicts with an advance directive.

"(2) The written information described in paragraph (1)(A) shall be provided to an adult individual —

"(A) in the case of a hospital, at the time of the individual's admission as an inpatient,

"(B) in the case of a skilled nursing facility, at the time of the individual's admission as a resident,

"(C) in the case of a home health agency, in advance of the individual coming under the care of the agency,

"(D) in the case of a hospice program, at the time of initial receipt of hospice care by the individual from the program, and

"(E) in the case of an eligible organization (as defined in section 1876(B)) or an organization provided payments under section 1833(a)(1)(A), at the time of enrollment of the individual with the organization.

"(3) In this subsection, the term 'advance directive' means a written instruction, such as a living will or durable power of attorney for health care, recognized under State law (whether statutory or as recognized by the courts of the State) and relating to the provision of such care when the individual is incapacitated."

(b) Application to Prepaid Organizations. — (1) Eligible Organizations. — Section 1876(c) of such Act (42 U.S.C. 1395 mm(c)) is amended by adding at the end the following new paragraph:

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"(8) A contract under this section shall provide that the eligible organization shall meet the requirement of section 1866(f) (relating to maintaining written policies and procedures respecting advance directives)."

(2) Other Prepaid Organizations. — Section 1833 of such Act (42 U.S.C. 13951) is amended by adding at the end the following new subsection:

"(r) The Secretary may not provide for payment under subsection (a) (1) (A) with respect to an organization unless the organization provides assurances satisfactory to the Secretary that the organization meets the requirement of section 1866(f) (relating to maintaining written policies and procedures respecting advance directives)."

(c) Effect on State Law. — Nothing in subsections (a) and (b) shall be construed to prohibit the application of a State law which allows for an objection on the basis of conscience for any health care provider or any agent of such provider which, as a matter of conscience, cannot implement an advance directive.

(d) Conforming Amendments. —

(1) Section 1819 (c)(1) of such Act (42 U.S.C. 1395i-3(c)(1)) is amended by adding at the end the following new subparagraph:

"(E) Information Respecting Advance Directives. — A skilled nursing facility must comply with the requirement of section 1866(f) (relating to maintaining written policies and procedures respecting advance directives)."

(2) Section 1891(a) of such Act (42 U.S.C. 1395bbb(a)) is amended by adding at the end the following:

"(6) The agency complies with the requirement of section 1866(f) (relating to maintaining written policies and procedures respecting advance directives)."

(e) Effective Dates. —

(1) The amendments made by subsections (a) and (d) shall apply with respect to services furnished on or after the first day of the first month beginning more than 1 year after the date of the enactment of this Act.

(2) The amendments made by subsection (b) shall apply to contracts under section 1876 of the Social Security Act and payments under section 1833 (a)(1)(A) of such Act as a first day of the first month beginning more than 1 year after the date of the enactment of this Act.

SEC. 4751. REQUIREMENTS FOR ADVANCED DIRECTIVES UNDER STATE PLANS FOR MEDICAL ASSISTANCE.

(a) In General. — Section 1902 (42 U.S.C. 1396a(a)), as amended by sections 4401(a)(2), 4601(d), 4701(a), 4711, and 4722 of this title, is amended —

(1) in subsection (a) —

(A) by striking "and" at the end of paragraph (55),

(B) by striking the period at the end of paragraph (56) and inserting "; and", and

(C) by inserting after paragraph (56) the following new paragraphs:

"(57) provide that each hospital, nursing facility, provider of home health care or personal care services, hospice program, or health maintenance organization (as defined in section 1903(m)(1)(A)) receiving funds under the plan shall comply with the requirements of subsection (w);

"(58) provide that the State, acting through a State agency, association, or other private nonprofit entity, develop a written description of the law of the State (whether statutory or as recognized by the courts of the State) concerning advance directives that would be distributed by providers or organizations under the requirements of subsection (w)."; and

(2) by adding at the end the following new subsection:

"(w)(1) For purposes of subsection (a)(57) and sections 1903(m)(1)(a) and 1919(c)(2)(E), the requirement of this subsection is that a provider or organization (as the case may be) maintain written policies and procedures with respect to all adult individuals receiving medical care by or through the provider or organization —

"(A) to provide written information to each such individual concerning —

"(i) an individual's rights under State law (whether statutory or as recognized by the courts of the State) to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives (as defined in paragraph (3)), and

"(ii) the provider's or organization's written policies respecting the implementation of such rights;

"(B) to document in the individual's medical record whether or not the individual has executed an advance directive;

"(C) not to condition the provision of care or otherwise discriminate against an individual based on whether or not the individual has executed an advance directive;"

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